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MAILED: 1/5/2001

IN THE MATTER OF:	
Charles L. Reinsmith Claimant	
v.	
Marine Terminals Corp., Matson Terminals, Inc., Eagle Marine Services, Ltd., and Container Stevedoring Corp. Employers	* Case No.: 2000-LHC-0704 * OWCP No.: 14-126106
and	
Majestic Insurance Co., Eagle Marine Services and Crawford & Company Carriers	
and	
Director, Office of Workers' Compensation Programs, United States Department of Labor Party-in-Interest	

APPEARANCES:

Mary Alice Theiler, Esq.
For the Claimant

Robert E. Babcock, Esq.
For Marine Terminal and Majestic Insurance

Carl E. Forsberg, Esq.
For Matson Terminals and Eagle Marine Services

Russell A. Metz, Esq.
For Container Stevedoring and Crawford & Company

Matthew L. Vadnal, Esq.
Jay Williamson, Esq.
For the Director

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on October 16, 2000 in Seattle, Washington, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit, EX for an exhibit offered by Container Stevedoring, RX for an exhibit offered by Matson Terminals and MX for an exhibit offered by Marine Terminal. This decision is being rendered after having given full consideration to the entire record which was closed on November 16, 2000, at which time the official hearing transcript was filed with our Docket Clerk.

Stipulations and Issues

The parties stipulate (ALJ EX 4-6, 13), and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employers were in an employee-employer relationship at the relevant times.

3. Claimant alleges that he suffered an injury on August 25, 1997 in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The applicable average weekly wage is in dispute.

7. Certain compensation and medical benefits have been paid to or on behalf of the Claimant, and such benefits are reflected in the various forms filed with the OWCP by the Employers joined herein.

The unresolved issues in this proceeding are:

1. Whether Claimant's current disability is due to his 1997 injury.

2. If so, the nature and extent of his disability.

3. Responsible Employer and Carrier.

Summary of the Evidence

Charles L. Reinsmith ("Claimant" herein), fifty-six (56) years of age, with a high school education and some college education, has an employment history of manual labor. He began working in the maritime industry as a traditional longshore worker in August of 1989 as a casual worker. He became a so-called "B" registered worker in October of 1994 and he anticipates becoming registered as an "A" worker early next year, although such status may be delayed as he now is out on medical leave. (TR 76-81; RX 16)

Claimant's medical records reflect that he injured his right shoulder on August 30, 1994 when he was lifting "something heavy." A right shoulder sprain was diagnosed (CX 18 at 123) and Dr. Michael E. Morris, treating Claimant conservatively, referred him to physical therapy for his "right shoulder probable impingement syndrome." (CX 18 at 126) Claimant was out of work for several weeks and on September 22, 1994 the doctor released him to "return to work and see how he deals with that" as his "shoulder (was then) pretty much back to normal." (CX 18 at 127, 136) Dr. Morris next saw Claimant on February 26, 1995 for evaluation of "recurrent right shoulder impingement/subacromial bursitis." (CX 18 at 129)

Claimant continued working and on March 28, 1995 the doctor "had a long discussion (with Claimant) about the shoulder" problem and the doctor again recommended a course of physical therapy as "probably the best way to try to get this shoulder to settle down." (CX 18 at 130-132) The physical therapy began two days later (CX 18 at 133-134) and, as of October 3, 1995, Claimant reported that "the injection helped him." (CX 18 at 135)

Claimant had no difficulty performing his assigned waterfront duties and he has neither sustained, nor does he claim, any disability as a result of his August 30, 1994 injury. (TR 165)

On August 25, 1997 Claimant was working for Marine Terminal Corporation ("MTC") at Pier 46 at the Port of Seattle, Washington, on a maritime facility adjacent to the navigable waters of Elliott Bay and Puget Sound where cargo is unloaded from or loaded onto ocean-going vessels. At that time he was operating a so-called "semi" and he had duties of moving around the containers on the waterfront, at which time his right shoulder "locked" and his right arm became "numb" after he had been operating/manipulating the shifting lever of the semi, a process involving reaching out about two feet to the side to reach and pull that lever. He reported the accident to his foreman and he was taken to the Industrial Clinic on Marginal Way. MTC's injury report identifies the "right shoulder" as the affected body part and describes the injury as a "locked shoulder." (CX 1) MTC and its Carrier, Majestic Insurance Company ("Respondents" herein) authorized appropriate medical treatment (CX 2) on that day by Clyde H. Wilson, M.D., at the Virginia Mason Occupational Medicine Clinic. (CX 3) Compensation benefits began the following day (CX 5) and they were paid until February 16, 1998 at the weekly rate of $801.06. (CX 6)

Claimant's right shoulder problems continued and the Carrier referred Claimant for an examination by John E. Dunn, M.D., and the doctor saw Claimant on November 12, 1997. Dr. Dunn took the following history report from the Claimant (CX 17 at 60-61):

"**HISTORY OF INJURY:**

This 53-year-old man was injured while working as a longshoreman driving a truck for Marine Terminals Inc. on 8-25-97. He had

been working for them for about eight years. The injury occurred when he was simply changing gears and he felt a sudden, fairly devastating pain in his right shoulder.

He had had a past history of a problem with his right shoulder either in 1994 or 1995. The records speak of this being in 1995 but he has a history of an x-ray of his shoulder having been taken on 8-30-94 and he thinks that this is probably the correct date. At that time he was doing the same kind of work but was working for Eagle Marine. He lifted a heavy object when he felt a sudden pop in his right shoulder. The x-rays of 8-30-94 apparently were normal. He is unsure if he had a subsequent MRI but he did not have an arthrogram. He had physical therapy, medications by mouth, one week off work and a single corticosteroid injection. He did very well and he says that he became symptom free following that treatment until the injury of 8-25-97.

Following the injury of 8-25-97, he had an x-ray of his shoulder which was read by the radiologist as showing mild degenerative changes. A subsequent x-ray of 9-25-97, however, does not speak about degenerative changes. Dr. Morris, the orthopedic surgeon, read the 9-25-97 x-rays as showing a hood on the cromion.

His treatment following this injury has been as follows: He has been off work to the present time. He has taken naproxen and is taking it now. He had physical therapy but he no longer takes it. He does some exercises on his own. He has had no corticosteroid injections.

He continues to have symptoms on a regular basis in his right shoulder and he is not improving with the passage of time. He points toward the anterolateral aspect of the shoulder as being the source of his pain. He gets snapping and popping in the shoulder that he says he never had before. Reaching forward hurts him and especially reaching backward to do such things as put on a coat or reach into his rear pocket are very painful. Lying on his right side bothers him to some degree but not consistently. He feels the pain down his upper arm to some degree but not to his elbow. He has some neck discomfort but he has had this for a long period of time and it is no different now than it was a year ago. He has no numbness in his right arm. He gets rare tingling in his right arm. He has no left shoulder symptoms and his other joints are unaffected, according to the doctor.

Dr. Dunn, after the usual social and employment history, his review of diagnostic tests and the physical examination, concluded as follows (CX 17 at 63-64):

"**DIAGNOSIS:**

Rotator cuff tendinitis right shoulder, suspect torn rotator cuff right shoulder.

"**ANSWERS TO QUESTIONS POSED IN THE COVER LETTER:**

1. The subjective complaints are recorded above.

2. There are no objective findings in this complaint at this point but the patient's subjective complaints are very consistent with the above diagnosis.

3. As stated above, the subjective complaints are quite consistent with the diagnosis.

4. The diagnosis is as given above under Diagnosis. This patient would appear to at least have had rotator cuff tendinitis in either 1994 or 1995 (those records were not available today). He may even have had a rotator cuff tear at that time. It would appear, however, that he did very well between that episode and the present injury. The patient's present symptoms should be considered as due entirely to the injury of 8-25-97.

5. The patient has done poorly with conservative treatment for his shoulder to this point. He does not desire to have a corticosteroid injection. For this reason it would be recommended that this patient have either an MRI or an arthrogram of his right shoulder at this point, whichever his surgeon would prefer. If the test shows a torn rotator cuff, he should have a rotator cuff repair. If the test suggests that his problem is just a rotator cuff tendinitis or bursitis, there would still be a strong argument for treating his shoulder surgically and I would support a surgical approach to this problem if that were his surgeon's choice.

6. The patient has not reached maximum medical improvement. It is unknown when he might reach maximum medical

improvement, depending upon whether he has subsequent surgery or not.

7. The patient may or may not have a permanent impairment. It is too early to rate him for a permanent impairment at this time. It would be expected, however, that his shoulder will eventually do well and I would expect that he will be able to return to his usual work following the definitive treatment for this condition," according to the doctor.

As can be seen, Dr. Dunn reported that Claimant's subjective complaints were consistent with rotator cuff tendinitis and he suspected the presence of a torn rotator cuff of the right shoulder. Dr. Dunn opined that the symptoms that he observed on November 12, 1997 were due entirely to the August 25, 1997 waterfront injury and he opined that surgery would be needed to evaluate fully the Claimant's right shoulder symptoms and to correct that problem. (RX 13 at 68-72)

Claimant's right shoulder problems persisted and he went to see Charles A. Peterson, M.D., on December 4, 1997 and the doctor took the following history report (CX 19 at 71):

"Mr. Reinsmith is 53 years old. He is seen today about his right dominant shoulder.

"He had an injury to the shoulder on 8/25/97 when apparently he was driving a truck, he works as a longshoreman. He reached back and upward with his right to shift and had sudden pain occur in the arm. He says he has not worked since then because of the pain. There is some confusion with his insurance, it is unclear as to why he has not gotten in to have this treated before. He went to see Dr. Morris and then could not get back to see him for an extended period of time. This has been some confusion with his insurance. He had a special exam done by Dr. Dunn who thought he might have a torn rotator cuff. He was given some Anaprox to take.

"Two years ago he had a similar episode when he was lifting a 60 pound turnbuckle and felt a pop occur in his shoulder. He got better after a cortisone shot.

"He says now the problem is that he cannot move the arm comfortably. He cannot lift overhead. He cannot throw with the arm. He cannot sleep on it. It hurts, crackles and pops and it feels stiff.

"... and he had an arthroscopic right knee surgery done at Group Health in 1996. He is currently taking Aleve, two tablets every 4 to 6 hours. He also has been taking some Ibuprofen.

"He has been working as a longshoreman for three years.

"He, in addition, has back pain and shortness of breath. He does not smoke. He denies alcohol usage. He has no allergies.

"On examination of his shoulder now, he has pain with motion. He holds the arm closely to his side. With urging, however, I can get him to forward flex to 140°, abduct to 95°, externally rotate 85° and internally rotate 55°, he can only reach to the buttock. He has fairly good strength of external rotation but it is painful. He has excellent strength of internal rotation. He has pain with impingement but I cannot tell for sure what in going on there. He has only minimal tenderness around the shoulder. He has good grip..."

Dr. Peterson, after the usual social and employment history and the physical examination, concluded as follows (CX 19 at 72):

"**IMPRESSIONS:** ACUTE ROTATOR CUFF TENDINITIS, NOW CHRONIC, PROBABLY SUPERIMPOSED ON PRE-EXISTING ROTATOR CUFF TEAR, RESULTANT OF AN INJURY TWO YEARS AGO.

"**PLAN:** I explained to him that we can do an arthrogram to prove what is going on with him. He is not sure he wants to have that done. I have suggested to him that we could have an arthroscopy done to see what is going on and, at the same time, either repair his rotator cuff open or do an arthroscopic repair or do a simple acrominoplasty with debridement. This will all depend on the pathology found. He seems to understand all this. I showed him the model of the shoulder.

"We talked about the diagnosis, complications, benefits and risks of surgery and he understands all that and wants to proceed. We will get it set up for him at some time in the not too distant future.

"In the meantime, he is off work.

"See me back when he is ready for surgery," according to the doctor.

Diagnostic tests led the doctor to conclude that Claimant's right shoulder problems were due to rotator cuff tendinitis and the doctor also suspected a possible rotator cuff tear. Claimant underwent right shoulder arthroscopy and subacromial decompression with no complications on December 31, 1997 as an outpatient. (CX 23) A course of physical therapy began on January 6, 1998 (CX 19 at 73) and, as of February 13, 1998, "Claimant wanted to return to work on February 16, 1998" and the doctor gave him an "amended work release form" (CX 19 at 74) permitting him to return to work on February 17, 1998 at his original job. (CX 19 at 75-76) As of March 17, 1998 Claimant was doing well and the doctor "would expect (that) his claim can be closed in another two or three months. As of May 18, 1998 Dr. Peterson opined that Claimant had had a "satisfactory resolution of (the) tendinitis of the shoulder" and the doctor released Claimant on a p.r.n. basis. (CX 19 at 77) Claimant was encouraged to do his "rotator cuff exercises again" on September 2, 1998 and, as of October 5, 1998, Claimant told the doctor that "he is pretty much happy with his shoulder," that he "can do almost everything he wants" and that "he is working," although "every once in awhile, he has a problem where he gets his arm up overhead and it locks" and that "he has to have somebody help him get his arm down." (CX 19 at 78)

As of November 19, 1998 Dr. Peterson opined that "his claim can be closed" and that "utilizing the AMA **Guidelines**, using Figures 38, 41 and 44, he has an impairment of 6% to the upper extremity." (CX 19 at 79)

Dr. Peterson next saw Claimant on July 1, 1999 and the doctor sent the following letter to Claimant's attorney on July 8, 1999 (CX 19 at 82):

"I saw Mr. Reinsmith on July 1, 1999.

"At that time, he was having increasing pain in the shoulder. This was related to the changes in the job down at the Waterfront. It appears that he has developed a spur over the medial acromion and possibly the AC joint.

"It is my impression that he is developing AC joint arthritis, a labral tear, or impingement. I thing that he is probably going to need to be rearthroscoped and have his AC joint removed at some time. At that time, we would look at his labrum to be sure that there is no tear there.

"At the time I last saw him, I told him that he could go back to work and do everything that he could do with the shoulder. However, it sounds like he is going to have problems doing the overhead heavy work that is required now that some of the work has moved to Tacoma. I told him to not put any limitations on his work and see what happens to the shoulder. If this becomes too much of a problem for him, then that would force us to do something sooner rather than later," according to the doctor.

Dr. Peterson sent the following letter to Claimant's attorney on October 25, 1999 (CX 19 at 83):

"It is my opinion that the need for re-operation on Mr. Reinsmith's shoulder is a continuation of the previous problem. Essentially, he either has a tear of his rotator cuff or he has continued tendinitis. In addition, he has a spur, which either was not removed totally at the time of his surgery or it has re-grown.

"He should have re-arthroscopy and removal of the spur and a determination made as to whether he has damaged his cuff. His arthrogram done prior to claim closure was normal. Therefore, the need for the spur removal and removal of the AC joint as part of the spur removal is a direct result of his previous industrial injury," according to the doctor.

I note that Claimant's counsel by letter dated July 12, 1999 (CX 31 at 137), advised Majestic Insurance that Claimant was having on-going shoulder problems and that "Dr. Peterson is recommending an arthroscope." Counsel sent similar letters to that Carrier on July 16, 1999 and on October 13, 1999. The Carrier's position is outlined in its November 12, 1999 response to the OWCP. (CX 31 at 138-144) Claimant's counsel advised the OWCP, by letter dated December 8, 1999 (CX 31 at 146) (Emphasis added):

> **"To respond to your December 3, 1999 letter, the Claimant is not aware of any new injury or aggravation of a pre-existing condition that might be the responsibility of another employer. As far as we know, and as corroborated by Dr. Charles Peterson's reports, the need for continuing medical treatment is related to the original Marine Terminals injury."**

Claimant continued working and he delayed that recommended

surgery as long as possible and he finally underwent the surgery on June 5, 2000 (CX 22 at 99-100) and he has not worked since that time as Dr. Peterson has not released him to return to work. (CX 19 at 85-86)

MTC referred Claimant for an evaluation by its medical expert, Richard G. McCollum, M.D., an orthopedic surgeon, and the doctor, after the usual social and employment history, his review of Claimant's medical records and the physical examination, concluded as follows (RX 14):

"DIAGNOSTIC STUDIES: No previous diagnostic studies are available for review, and no additional studies are deemed necessary today.

"DIAGNOSIS(es): Impingement syndrome of right shoulder and rotator cuff tendinitis, due to the injury of August 25, 1997.

"DISCUSSION: The Claimant had his surgery at the end of 1997; and Dr. Peterson noted by May 18, 1998, that the condition had resolved. He did see him again on September 2, 1998, as well as on October 5, 1998, at which time he wanted to close the claim. Dr. Peterson ordered an arthrogram and post arthrogram CT scan, which I do not think showed a significant problem which would relate to the original injury, only some mild to moderate acromioclavicular joint changes. A closing examination was done on November 16, 1998. Dr. Peterson indicated that further treatment was not needed.

"Subsequent to that, on July 1, 1999, a negative impingement sign was noted, but it was felt that the Claimant had a big spur under the medial acromion. In this examiner's opinion, this represents a new finding. I do not see that the bone spur has any relationship to the original injury. With the job that he does, I believe the Claimant could have had an aggravation by the additional work. Also, it is a degenerative spur, so it could occur as a natural progression. There is nothing in Dr. Peterson's reports to suggest that this spur is ongoing and would be expected from the problem that he had.

"Therefore, it seems to me that his apparent indication for surgery is based on a new problem in the right shoulder that has no relationship to the injury of August 25, 1997. This is more than just a conjectural statement. The Claimant did have the arthrogram and CT after the arthrogram, which was normal; and Dr. Peterson refers to that on July 1, 1999, so the bone spur

was not there then. Thus, it is a new problem; and if it does involve the acromioclavicular joint, then that is certainly not part of the original injury.

"I do not have any objection to the proposed repeat arthroscopy, but I do not think it is related to the effects of the injury of August 25, 1997.

"The condition has worsened, but due to the development of the bone spur, which cannot be identified with the original injury. The type of work he does is heavy lifting and overhead work would contribute to the progression of a degenerative condition of the right shoulder, which this appears to be; and ongoing work along the way after November 16, 1998, could certainly be a contributing factor," according to the doctor.

Dr. McCollum reiterated his opinions at his April 14, 2000 deposition, the transcript of which is in evidence as MX 1.

Dr. Peterson sent the following letter to Claimant's attorney on June 7, 2000 (CX 19 at 84):

"Mr. Reinsmith underwent shoulder arthroscopy, debridement of subacromial space (acromioplasty) and AC joint resection.

"The purpose of the AC joint resection, also known as a Mumford procedure, which was the primary operation here, was to alleviate arthritis of the AC joint.

"His AC joint arthritis probably pre-existed 1997 injury at work. However, the injury was an aggravating factor which caused the AC joint arthritis to become symptomatic.

"The AC joint at the time of the surgery was found to be severely arthritic.

"It is my opinion that if he had not had the injury at work, it is likely that the AC joint arthritis would not have been symptomatic and he would not have required surgery."

Dr. Peterson's supplemental progress notes relating to Claimant's visits to the doctor between April 26, 2000 and August 24, 2000 are in evidence as CX 33. I note that the doctor has continued to keep Claimant out of work as totally disabled, as he has not yet recovered from his surgery to repair the AC joint arthritis and impingement syndrome. (CX 33 at 153)

Dr. Peterson sent copies of these progress notes to Majestic Insurance Company, the doctor noting, as of June 26, 2000, "slowly resolving shoulder pain following acromioplasty with AC joint resection." (CX 33 at 154)

However, as of July 17, 2000, Claimant reported that he still experienced persistent shoulder pain and he was told "to continue his exercises and strengthening." Two weeks later Claimant was still "having trouble because he cannot go to physical therapy because his claim has not been accepted," and the doctor prescribed a home exercise program. As of August 23, 2000 the right shoulder pain persisted and Claimant again advised the doctor that he could not go to physical therapy because the Carrier would not authorize it, the doctor concluding, "I think it is important we get this going so that physical therapy get started." (CX 33 at 155, 157)

As of September 11, 2000 the doctor's impression was "slowly resolving shoulder tendinitis, AC joint arthritis." (CX 33 at 156)

As of June 15, 2000 Dr. Peterson again opined that claimant's current disability is due to his August 25, 1997 waterfront injury. (CX 32 at 121-122)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a most credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of

employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has considered the Employer’s burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit held that an employer need not totally rule out any possible causal relationship between a claimant’s employment and his disability in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the particular employment with that employer. **Id**., 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Hartford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury

and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

Thus, as noted, to establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents substantial evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. As noted, the crucial issue is whether Claimant has

sustained one injury, two injuries or even three injuries resulting in his current disability. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out

of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As several of the Respondents dispute that the Section 20(a) presumption is invoked because of the possibility that Claimant has sustained more than one injury, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Sir Gean Amos v. Director, OWCP**, F.3d (9th Cir. 1998), **amended**, F.3d , BRBS (CRT)(9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his AC degenerative joint arthritis and impingement syndrome, resulted from working conditions and/or resulted from his August 25, 1997 injury at the Employer's facility. The Respondents have introduced substantial evidence severing the connection between such harm and Claimant's maritime employment as to whether Claimant has sustained one injury or three separate and discrete injuries.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046

(5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

In the case at bar MTC and its Carrier, Majestic Insurance, have taken the position that claimant’s disability on and after June 5, 2000, as well as his need for surgery on that date, is due, not to his August 25, 1997 injury but to his physically-demanding and repetitive activities after his return to work on February 18, 1998 as a longshore worker on the waterfront. (TR 168-177)

This case presents the rather interesting issue as to whether Claimant has sustained only one injury on August 25, 1997 or whether Respondents may allege and establish liability upon a subsequent employer, pursuant to the so-called “last employer rule,” as a result of repetitive and cumulative trauma between February 18, 1998 and June 1, 2000. I shall briefly restate the parties’ positions to put this matter into proper perspective for the benefit of the parties and reviewing authorities.

In support of his position that he sustained only one injury, and that on August 25, 1997, Claimant points out that after his shoulder surgery in December 1997, he returned to most of the jobs he was doing previously, except that he avoided the

heavier jobs as an accommodation to his continuing shoulder symptoms. Although his shoulder was much improved following the December 1997 surgery, he continued to consistently have one particular problem when raising his arm to an upright and extended position. The arm would tend to lock, often necessitating him to ask for assistance from a co-worker in lowering it. The record does not show that his symptoms worsened in any particular way or that he suffered a re-injury or aggravation of the shoulder condition. It simply kept hurting. However, he continued to have one very specific, consistent problem that was not alleviated by the December 1997 surgery. When the problem continued, Dr. Peterson determined that it would be best to try to ascertain the cause, and recommended additional arthroscopy, which was conducted to address the problem. Following that procedure, Dr. Peterson reiterated his opinion that the condition was related to the August 25, 1997 injury. (CX 19 at 68-86; TR 164-168)

The "last employer" rule was established for social policy reasons "to avoid the difficulty and delay of apportioning liability among several employers," and to avoid protracted litigation as has happened in the case at bar. **Foundation Constructors v. Director, OWCP**, 950 F.2d 621, 623 (9th Cir. 1991). The rule "is designed to encourage administrative efficiency and prompt payment of benefits." **Benjamin v. Container Stevedoring Co.**, 34 BRBS 115 (ALJ)(1999). This relieves the Claimant of the often impossible, and always time-consuming, task of attempting to divide up responsibility for the causation of his medical condition among multiple employers, and is consistent with the "humanitarian purposes" of the LHWCA that construes liberally the Act's provisions to avoid harsh and incongruous results. **Port of Portland v. Director, OWCP**, 33 BRBS 143, 147 (CRT) (9th Cir. 1999) citing **Voris v. Eikel**, 346 U.S. 328, 333, 98 L.Ed. 2d 5, 74 S.Ct. 88 (1953) and **Matulic v. Director, OWCP**, 154 F.3d 1052, 1057 (9th Cir. 1998)]. The intent of Congress was to assure full compensation to injured workers and remove them from the burden of delay inherent in litigating complex issues of proportionate liability. **Todd Shipyards Corp v. Black**, 706 F.2d 1512 (9th Cir. 1983)

The employer against whom a claim is filed bears the burden of demonstrating it is not the responsible employer. **Flanagan v. McAllister Bros, Inc.**, 33 BRBS 209 (1999). A determination as to which employer is liable requires that the administrative law judge weigh the evidence. **Buchanan v. International**

Transportation Services, 31 BRBS 81 (1997) If a disability results from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the prior injury is compensable and the prior Employer is responsible. **Kelaita v. Director, OWCP**, 799 F.2d 1308 (9th Cir. 1986)

Claimant's medical doctor has stated that his June 2000 surgery was necessitated by his August 1997 injury. It alleviated AC joint arthritis which "probably" pre-existed the injury but which was made symptomatic by it. Dr. Peterson does not identify any other contributing cause for the surgery. Greater weight is afforded to a treating physician's opinion because "he is employed to cure and has a greater opportunity to know and observe the patient as an individual." **Amos v. Director, OWCP**, 153 F.2d 1051, 1054 (9th Cir. 1998). **See also Pietrunti, supra**.

The "last employer rule" was developed to aid, not hinder, Claimants in their pursuit of timely and appropriate relief for industrial injuries. In this case, Claimant's symptoms remained constant following the initial surgery for his 1997 injury. He continued to consistently have problems with his arm locking up in an overhead position. It continued to hurt. Indeed, it was the consistency and pervasiveness of Claimant's problems that convinced his treating doctor to take a second look at the shoulder surgically, discovering the presence of arthritis that had "probably" pre-existed the 1997 injury but had been made symptomatic by it. (CX 19)

As might be expected, Respondents contend that the need for the surgery and post-surgical disability is partially attributable to Claimant's work activities and, therefore, is the responsibility of the employer/carrier for which Claimant last worked before the need for that disabling surgery materialized. (TR 168-177)

Specifically, MTC contends that

(a) each episode of the pain that accompanies an impingement syndrome/tendinitis experienced by Claimant during his continuing work activities was an "injury" within the meaning of the Act, and that

(b) the employer/carrier at the time of the last episode of work-related pain that preceded the recommendation for corrective surgery is responsible for further benefits unless that employer can prove

> (i) a subsequent injury that played an additional causal role, or
>
> (ii) that its own injury did not cause, contribute to, or hasten the need for surgery and disability.

In addition to Claimant's own reports of increasing difficulties to Dr. Peterson, (CX 19), the current proof supportive of MTC's contention is found in the deposition of Dr. Richard G. McCollum. (MX 1)

That deposition, taken prior to surgery, described the spur on the underside of the acromium (the area "flattened off" by Dr. Peterson) as one part of the cause of Claimant's continuing symptoms and developing impingement/tendinitis. Dr. McCollum filled out the causal portrait by attributing the development of tendinitis and the impingement syndrome - the conditions for which surgery was required - to "repeat contact" between the spur and the rotator cuff that accompanied all activities that required bringing "the elbow up from its normal relaxed position and moving it outside or up," specifically including the activities involved in truck driving and overhead reaching. **See** McCollum deposition in evidence as MX 1.

MTC points out that Claimant's subsequent work activities involved those motions and that those motions were accompanied by continued shoulder pain.

According to MTC, there ***is*** substantial evidence that Claimant experienced continuing trauma, continuing "injuries," during work with all three employers that caused, contributed to, or hastened the need for his further disability and surgery, MTC pointing to the following evidence in support of its position. (TR 168-177)

MTC points to Claimant's testimony that he experienced "pain" every day and that the continuing experience of pain was the cause of his return visit to Dr. Peterson on July 1, 1999. (RX 16; CX 19 at 80-81)

Moreover, according to MTC, Dr. Peterson has confirmed that it was Claimant's report of "increasing pain . . . related to changes in the job" (and the occasional locking of his shoulder as well as the discovery of the large acromial spur) that caused the need for surgery. (CX 19 at 80)

And, despite Dr. Peterson's continued characterization of the need for surgery as a "direct result" on the initial injury and his description of that injury as "an aggravating factor," he has not expressed any opinion countering Dr. McCollum's clear conclusion that subsequent work activities *also* aggravated the condition and *also* contributed to the current disability and need for surgery, thereby resulting in a new and discrete injury, according to MTC.

MTC also points out that the subsequent employers have not contradicted the evidence that establishes that Claimant experienced a continuing trauma in the form of subsequent aggravations or exacerbations during subsequent employment or that what he did experience played a contributing role in the medical advice and the recommendation that he undergo surgery.

MTC further submits that, given Dr. McCollum's opinions and Dr. Peterson's reports (including his reports of Claimant's own statements about "increasing pain" on the job), there is substantial evidence permitting this Court to invoke the "last employer rule" and to impose liability upon a subsequent employer. (TR 168-177)

On the other hand, Matson Terminals points initially to the procedural posture of this case wherein MTC had joined Container Stevedoring and Matson, as potentially responsible employers in this action, on the eve of an administrative hearing, based on its own speculative claim that Claimant's July 1, 1999 visit with Dr. Peterson must have been precipitated by the occurrence of a new injury during the prior two-week period (June 19 through Jun 29, 1999). (TR 177-183)

According to counsel for Matson, MTC has not met its burden of proving that a new injury occurred during this two-week period. All of the evidence in this case points squarely to MTC as the employer responsible for Claimant's current medical condition. Even if one grants the position of MTC, **arguendo**, that Claimant may have incurred a new injury during the two-week period leading to his July 1, 1999 visit with Dr. Peterson, the

evidence still indicates that MTC was the only employer for whom Claimant could have worked when the new injury occurred.

Claimant testified that it was the heavier "lashing" jobs, and not lighter, "semi" work, that hurt his shoulder. **See** Matson and EMS's Joinder in Container Stevedoring's Motion for Summary Dismissal, pp. 3-5; **see also**, Declaration of Brent Caldwell, filed in support of Matson's and EMS's Joinder, pp. 2-3. Claimant's Pacific Maritime Association ("PMA") employment records (CX 15, CX 16) indicate that Claimant performed only "semi" work (code "036") while employed by EMS and Matson during the two-week period in which Marine Terminals claims the new injury occurred. During this time, Claimant did not perform any "lashing" work for either Matson or EMS. **See** Declaration of Brent Caldwell filed in support of EMS and Matson's Joinder ("Declaration of Brent Caldwell"), pp. 2-3. On the contrary, however, **the employer for whom Claimant performed "lashing" work during the two-week period is Marine Terminals itself.** (Emphasis added) (TR 97, 114, 124, 127, 168)

Based on conversations between counsel, Matson and EMS have confirmed that MTC's PMA employer code is "189." Claimant's PMA records report employer "189" to be the only employer for whom Claimant performed "lashing" work (work code "009") during the two-week period MTC identified. **See** Declaration of Brent Caldwell, page 3.

Thus, Matson submits that MTC is the only employer for whom Claimant worked during the two-week period when MTC claims Claimant sustained a new injury as, **Marine Terminals is the only employer in that period for whom Claimant did "lashing" work.** Claimant did not do any "lashing" work for EMS or Matson during this period. Since Claimant's deposition testimony makes clear it is "lashing" work, and not the lighter "semi" work that affected his shoulder, MTC's argument for imposing liability upon EMS and Matson in this action is unsupported, even if one grants MTC its allegation that a new injury occurred in the two weeks leading to Claimant's July 1, 1999 visit with Dr. Peterson and the medical necessity for arthroscopic surgery.

In summary, MTC has failed to meet its burden of substantiating its inclusion of Matson and EMS as potential respondents in this case. Even if one accepts the position of MTC, **arguendo**, that a new injury may have occurred in the two weeks preceding July 1, 1999, the evidence reveals that MTC is

the employer most likely to be responsible for any new injury during this period. Based on Claimant's testimony, MTC is the only employer during the period for whom Claimant did the heavier "lashing" work he claimed hurt is shoulder. Matson, therefore, submits that it has no liability herein. (TR 177-183)

Likewise, Container Stevedoring posits a similar argument in support of its position that it is not liable for any benefits herein. (TR 58-65, 183-188)

Container Stevedoring rejects the argument that Claimant had re-injured or aggravated his right shoulder while working for it as a result of his work activities upon his return to work on February 18, 1998, especially as he had reached a permanent and stationary status in November of 1998. According to Container Stevedoring, Claimant's testimony and the medical evidence establish conclusively that his current shoulder pain is simply an extension or continuation or the natural progression of the pain he experienced after undergoing surgery on December 31, 1997 for his August 25, 1997 injury. While Dr. Peterson may have labeled Claimant's shoulder as "stationary" on November 16, 1998, Claimant testified that his right shoulder symptoms were continuous and unchanged since just after the December 31, 1997 surgery, suggesting that the surgery may not have been entirely successful. Indeed, Dr. Peterson performed additional surgery on June 5, 2000 (CX 22) to repair problems that he concluded were directly attributable to Claimant's prior industrial accident on August 25, 1997. (CX 19 at 83)

Moreover, Claimant, who has worked on the waterfront for many years and who knows the procedures for reporting to his supervisors work-related incidents, no matter how trivial, and filing benefits therefor, testified that he had not sustained any new injury and had not experienced an aggravating event while working for Container Stevedoring, that the jobs that had the most negative effects on his right shoulder were truck-driving jobs, that during the relevant time period Claimant did not work as a truck driver at Container Stevedoring and, most important, that he had neither filed an injury report (**i.e.**, Form LS-201) against Container Stevedoring nor sought compensation benefits against it by filing the appropriate Form LS-203. (TR 165)

The law governing this responsibility debate in the Ninth Circuit was established in **Kelaita v. Director, OWCP**, 799 F.2d 1308 (9th Cir. 1986) and **Foundation Constructors v. Director, OWCP**, 950 F.2d 621 (9th Cir. 1991).

Foundation Constructors makes it clear *any* subsequent injury that contributes to - is a *partial* cause of - the ultimate disability will shift responsibility from the employer at the time of the first injury to the employer at the time of the last. Indeed, in **Port of Portland v. Director, OWCP**, 932 F.2d 836, 839-840 (9th Cir. 1991), the rule was accurately described as the "aggravation rule."

> "Foundation's liability under the Act turns on the last employer rule. As first announced in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137, 145 (2d Cir.), **cert. denied**, 350 U.S. 913 (1955), and subsequently applied by this court on many occasions, **see**, **e.g.**, **Todd Pacific Shipyards v. Director, OWCP (Picinich)**, 914 F.2d 1317, 1319 (9th Cir. 1990); K**elaita v. Director, OWCP**, 799 F.2d 1308, 1311 (9th Cir. 1986); **Todd Shipyards v. Black**, 717 F.2d 1280, 1284 (9th Cir. 1983), **cert. denied**, 466 U.S. 937 (1984), the rule generally holds the claimant's last employer liable for all of the compensation due the claimant, even though prior employers of the claimant may have contributed to the claimant's disability. This rule serves to avoid the difficulties and delays connected with trying to apportion liability among several employers, and works to apportion liability in a roughly equitable manner, since all employers will be the last employer a proportionate share of the time." **General Ship Service v. Director, OWCP**, 938 F.2d 960, 962 (9th Cir. 1991), (quoting **Black**, 717 F.2d at 1285).
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> In **Kelaita** this court recognized that the last employer rule, as announced in **Cardillo**, had sprouted a branch. We observed that the traditional last employer rule was still applied in occupational disease cases, but that a new rule had developed in injury cases. **See Kelaita**, 799 F.2d at 1311. Since both rules were designed to determine whether a subsequent employer bore all the liability for

> disabilities caused by more than one employer, in **Kelaita** we said that there was still one rule, the last employer rule, that was "applied differently depending on whether a claimant's disability is characterized as an occupational disease or a two-injury case." **Id.** Subsequent cases have not been entirely clear on this distinction. Courts addressing occupational disease claims have directly applied the occupational disease branch of the last employer rule without finding it necessary to mention that another branch of the last employer rule exists governing injury cases. **See Picinich**, 914 F.2d at 1319; **General Ship Service**, 938 F.2d at 962. Others have described the two-injury branch as the "aggravation rule." **See Port of Portland v. Director, OWCP**, 932 F.2d 836, 839-840 (9th Cir. 1991).

The one versus two injury problem can be summarized as follows:

> If the disability resulted from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the prior injury is compensable and accordingly, the prior employer is responsible. ***If, on the other hand, the subsequent injury aggravated, accelerated or combined with claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury, and the subsequent employer is responsible.*** **Kelaita**, 799 F.2d at 1311.
>
> ***We have emphasized that "the aggravation [two-injury] rule applies "even though the worker did not incur the greater part of his injury with that particular employer.'"*** **Port of Portland v. Director, OWCP**, 932 F.2d 836, 839-40 (9th Cir. 1991)(quoting **Strachan Shipping Co. v. Nash**, 782 F.2d 513, 519 n.10 (5th Cir. 1986)(**en banc**)). ***Thus, if the six months Vanover spent jackhammering and engaging in heavy lifting for Foundation "aggravated" his preexisting back injuries, Foundation is liable under the Act."*** (Emphasis added)

From **Buchanan v. ITS Services, et al**, 33 BRBS 32, at 35-36 (1999), **appeal pending**, 9th Circuit Case No. 99-70631, it is

clear that current law imposes upon MTC the burden of proving the fact of a subsequent injury. However, if that burden is met, the employer at the time of a subsequent injury may escape responsibility only (a) by proving that that injury did *not* contribute to the onset of disability or (b) by proving the occurrence of a subsequent injury with another employer.

Claimant himself has testified that he experienced job-related symptoms of the diagnosed conditions (tendinitis and impingement syndrome) on all days of work for each of the current party employers. (TR 57, 72, 97, 114, 124, 127, 168)

Regardless of whether these symptoms were a constant experience or (as Claimant reported to his doctor) of increasing severity or frequency and regardless of whether they were accompanied by change to the underlying conditions, MTC has met its initial burden of proving subsequent "injuries." **The on-the-job occurrence of symptoms of an underlying condition is an "injury" even if the underlying conditions are wholly unaffected by work. See Crum v. General Adjustment Bureau**, 738 F.2d 474, 16 BRBS 115 (CRT)(D.C. Cir. 1984), **aff'g in relevant part** 16 BRBS 101 (1983). **See also, Pittman v. Jeffboat, Inc.**, 18 BRBS 212, 214 (1986).

Finally, lurking beneath the argument of Matson and Container is the unspoken belief that the subsequent employers must be immunized from responsibility because the need for further treatment and disability would have been ultimately recognized even if Claimant had not continued to work and experience pain. This too is wrong. The continuing experience of pain is what sent Claimant back to his doctor and generated the disabling diagnosis. The possibility that Claimant *might* have someday revisited his doctor and received the same diagnosis offers no protection to the subsequent employers. **When work-related activities hasten the onset of disability, even a disability that would have happened anyway, the disability is compensable**. **See, Fineman v. Newport News Shipbuilding and Dry Dock Co.**, 27 BRBS 104 (1993); **Gardner v. Director, OWCP**, 640 F.2d 1385, 1390, 13 BRBS 101, 107 (1st Cir. 1981).

In the case at bar, I have accepted Claimant's uncontradicted testimony (only Dr. McCollum disagrees as to the legal significance thereof) that he sustained a relatively minor injury in 1994, had recovered from that injury and seeks no

benefits as a result of that injury, and that his current disability and inability to return to work on and after June 3, 2000 is due solely to his August 25, 1997 serious injury while working for Marine Terminals (MTC) as the natural and unavoidable consequences of his August 25, 1997 injury.

I further find and conclude that Claimant did not sustain a new and discrete injury thereafter for the following reasons. He has been a longshore worker for many years, knows the rules and regulations of the various stevedoring firms requiring giving notice to the immediate supervisor or foreman of any work-related injury, no matter how slight. While Claimant experienced temporary flareups of shoulder pain, particularly after doing "lashing work" or driving a semi (TR 97, 114, 124, 127, 168), upon his return to work in 1998, these were just temporary flareups as the natural and unavoidable consequences of the 1997 injury.

Moreover, I have accepted Claimant's thesis because Claimant has maintained all along that his disability is due to the 1997 injury, and not to a subsequent injury, for example, on June 3, 2000, an injury that might result in a higher weekly compensation rate. In this regard, **see** OWCP Notice No. 91, dated September 14, 1996, wherein the maximum compensation rate for an injury on that date is $901.28. BRBS 3-151.

This Administrative Law Judge, in accepting Claimant's thesis, has given greater weight to the opinions of Claimant's treating physician, Dr. Peterson, who has been treating Claimant for many years. I have given lesser weight to the opinions of Dr. McCollum who saw Claimant on one occasion, several days before his April 14, 2000 deposition. (MX 1)

Accordingly, in view of the foregoing, I find and conclude that Claimant's current disability is due solely to his August 25, 1997 as the natural and unavoidable consequences thereof.

This closed record conclusively establishes, and I find and conclude, that the Claimant's current disability and his need for surgery on December 31, 1997 and on June 5, 2000 is due solely to his August 25, 1997 injury, that the Employers joined herein had timely notice, that certain compensation and medical benefits have been paid to or for him and that Claimant timely filed for benefits once a dispute arose between the parties. In

fact, the principal issue remaining is the nature and extent of Claimant's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

Sections 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "**Pepco**"). **Pepco**, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

In this proceeding, the Claimant has sought, both before the District Director and before this Court, benefits for temporary total disability from June 3, 2000 to date and continuing. (TR 37-46, 164-168) Moreover, the issue of permanency has not yet been considered by the Deputy Commissioner. (ALJ EX 1) **In this regard**, **see Seals v. Ingalls Shipbuilding, Division of Litton Systems, Inc.**, 8 BRBS 182 (1978).

Although Claimant's August 25, 1997 injury has resulted in a six (6%) percent permanent partial impairment of the right upper extremity, according to Dr. Peterson's disability rating, Claimant is not limited to the **Pepco** doctrine because he sustained a right shoulder injury on August 25, 1997 and because the shoulder is not a part of the body specifically identified at Sections 8(c)(1)-(19) of the Act. In this regard, **see Grimes v. Exxon Company**, 14BRBS 573 (1981).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to any work at this time. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employers did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a

total disability on and after June 3, 2000, (TR 41) as well as for the prior period of time he was unable to work, **i.e.**, from August 26, 1997 through February 6, 1998.

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The Act provides three methods for computing claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during **substantially** the whole of the year immediately preceding his injury. **Mulcare v. E.C. Ernst, Inc.**, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, **i.e.**, whether it is intermittent or permanent, **Eleazar v. General Dynamics Corporation**, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, **O'Connor v. Jeffboat, Inc.**, 8 BRBS 290, 292 (1978), and that he was not prevented from so working by weather conditions or by the employer's varying daily needs. **Lozupone v. Stephano Lozupone and Sons**, 12 BRBS 148, 156 and 157 (1979). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. **Hole v. Miami Shipyards Corp.**, 12 BRBS 38 (1980), **rev'd and remanded on other grounds**, 640 F.2d 769 (5th Cir. 1981). The Board has held that since Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. **See O'Connor v. Jeffboat, Inc.**, 8 BRBS 290 (1978). **See also Brien v. Precision Valve/Bayley Marine**, 23 BRBS 207 (1990); **Klubnikin v. Crescent Wharf &**

Warehouse Co., 16 BRBS 183 (1984). Moreover, since average weekly wage includes vacation pay in lieu of vacation, it is apparent that time taken for vacation is considered as part of an employee's time of employment. **See Waters v. Farmer's Export Co.**, 14 BRBS 102 (1981), **aff'd per curiam**, 710 F.2d 836 (5th Cir. 1983). **Duncan v. Washington Metropolitan Area Transit Authority**, 24 BRBS 133, 136 (1990); **Gilliam v. Addison Crane Co.**, 21 BRBS 91 (1987). The Board has held that 34.4 weeks' wages do constitute "substantially the whole of the year," **Duncan**, **supra**, but 33 weeks is not a substantial part of the previous year. **Lozupone**, **supra**. Claimant worked for the Employer for the 52 weeks prior to August 25, 1997 but he worked whenever there was a vessel in port and he was not a regular 5 or 6 day a week worker.

Therefore Section 10(a) is inapplicable. The second method for computing average weekly wage, found in Section 10(b), cannot be applied because of the paucity of evidence as to the wages earned by a comparable employee. **Cf. Newpark Shipbuilding & Repair, Inc. v. Roundtree**, 698 F.2d 743 (5th Cir. 1983), **rev'g on other grounds**, 13 BRBS 862 (1981), **rehearing granted en banc**, 706 F.2d 502 (5th Cir. 1983), **petition for review dismissed**, 723 F.2d 399 (5th Cir. 1984), **cert. denied**, 469 U.S. 818, 105 S.Ct. 88 (1984).

Whenever Sections 10(a) and (b) cannot "reasonably and fairly be applied," Section 10(c) is applied. **See National Steel & Shipbuilding Co. v. Bonner**, 600 F.2d 1288 (9th Cir. 1979); **Gilliam v. Addison Crane Company**, 22 BRBS 91, 93 (19987). The use of Section 10(c) is appropriate when Section 10(a) is inapplicable and the evidence is insufficient to apply Section 10(b). **See generally Turney v. Bethlehem Steel Corporation**, 17 BRBS 232, 237 (1985); **Cioffi v. Bethlehem Steel Corp.**, 15 BRBS 201 (1982); **Holmes v. Tampa Ship Repair and Dry Dock Co.**, 8 BRBS 455 (1978); **McDonough v. General Dynamics Corp.**, 8 BRBS 303 (1978). The primary concern when applying Section 10(c) is to determine a sum which "shall reasonably represent the . . . earning capacity of the injured employee." The Federal Courts and the Benefits Review Board have consistently held that Section 10(c) is the proper provision for calculating average weekly wage when the employee received an increase in salary shortly before his injury. **Hastings v. Earth Satellite Corp.**, 628 F.2d 85 (D.C. Cir. 1980), **cert. denied**, 449 U.S. 905 (1980); **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

Section 10(c) is the appropriate provision where claimant was unable to work in the year prior to the compensable injury due to a non-work-related injury. **Klubnikin v. Crescent Wharf and Warehouse Company**, 16 BRBS 182 (1984). When a claimant rejects work opportunities and for this reason does not realize earnings as high as his earning capacity, the claimant's actual earnings should be used as his average annual earnings. **Cioffi v. Bethlehem Steel Corp.**, 15 BRBS 201 (1982); **Conatser v. Pittsburgh Testing Laboratory**, 9 BRBS 541 (1978). The 52 week divisor of Section 10(d) must be used where earnings' records for a full year are available. **Roundtree**, **supra**, 13 BRBS 862 (1981); **compare Brown v. General Dynamics Corporation**, 7 BRBS 561 (1978). **See also McCullough v. Marathon LeTourneau Company**, 22 BRBS 359, 367 (1989).

In the case at bar, Claimant, in his pre-trial statement, and then later in his post-hearing brief, submits that his average weekly wage, pursuant to Section 10(c), may reasonably be set at $1,416.97. (ALJ EX 6; CX 36) Marine Terminal Corp. (MTC) submits that the average weekly wage for the alleged new and discrete injury on July 1, 1999 is the maximum compensation rate for an injury occurring on that date. (ALJ EX 5) Matson Terminals submits that the average weekly wage for the August 25, 1997 injury, pursuant to Section 10(a), is $1,406.22. (ALJ EX 4) Container Stevedoring submits that the average weekly wage is $1,025.91 with a compensation rate of $683.87. (EX 1) All counsel agreed at the hearing that the benefits payable to the Claimant are subject to the maximum compensation rate of $801.06 for the August 25, 1997 injury.

Accordingly, in view of the foregoing, I find and conclude that Claimant’s average weekly wage, pursuant to Section 10(c), may reasonably be set at $1,416.97. (ALJ EX 6, CX 36) However, pursuant to Section 6, Claimant’s weekly compensation benefits are limited to $801.06, the maximum rate for an injury on August 25, 1997. In this regard, **see** OWCP Notice No. 82, dated September 16, 1996. BRBS, page 3-137.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The

Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Respondents timely controverted Claimant’s entitlement to benefits. (CX 3, CX , CX 7, CX 12; RX 2-RX 4) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is

recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised MTC of his work-related injury on August 25, 1997 and requested appropriate medical care and treatment. However, while the Employer did accept the claim and did authorize certain medical care, there are certain unpaid medical expenses relating to Claimant’s August 25, 1997 injury, the resulting surgeries and pertinent treatment therefor. (CX 24-CX 28) Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, in view of the foregoing, MTC and its Carrier (“Respondents”) are responsible for those medical expenses relating to the August 25, 1997 injury, the resultant surgeries and pertinent treatment therefor, subject to the provisions of Section 7 of the Act. Claimant and Respondents should confer to determine which expenses relate to the injury before me and any dispute(s) should be submitted to the District Director for her consideration.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against MTC and its Carrier (Respondents). Claimant's attorney has not submitted her fee application. Within thirty (30) days of the receipt of

this Decision and Order, she shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Respondents' counsel who shall then have fourteen (14) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred after the informal conference. Services performed prior to that date should be submitted to the District Director for her consideration.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. MTC and Majestic Insurance Company ("Respondents") shall pay to the Claimant compensation for his temporary total disability from August 26, 1997 through February 6, 1998, and from June 3, 2000 through the present and continuing until further **ORDER** of this Court, at the weekly rate of $801.06, such compensation to be computed in accordance with Section 8(b) of the Act.

2. The Respondents shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his August 25, 1997 injury.

3. Interest shall be paid by the Respondents on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

4. The Respondents shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, including payment of those medical expenses in evidence as CX

24-CX 28), as specifically discussed herein, subject to the provisions of Section 7 of the Act.

5. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Respondents' counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference.

_____
DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts
DWD:jl